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IN THE

Supreme Court of the United States

October Term, 1971
No. 72-199

DOMINICK ROMANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, Domonick Romano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit entered on May 30, 1972.

OPINION BELOW

The memorandum opinion of the District Court of the Southern District of New York by Judge McMahon, which is not reported, was rendered on a motion to vacate sentence. A copy of that opinion is annexed hereto at pp. A-1 - 19 of the Appendix. The Court of Appeals for the Second Circuit rendered an opinion which has not as yet been reported. A copy of that opinion is appended hereto at pp. A20-22.

A petition for rehearing was made to the United States Court of

Appeals for the Second Circuit. The petition was filed timely on June 13, 1972. The petition for rehearing requested, among others, that the said Court of Appeals rehear the matter en banc. This application was denied on July 3, 1972. A copy of that opinion is appended hereto at pp. A-23.

JURISDICTION

The jurisdiction of this court is invoked under Title 28 of the United States Code, Section 1254(1) which provides for review by the Supreme Court:

> "By writ of certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

QUESTIONS PRESENTED

The questions presented are:

1. Was the Petitioner entitled to a hearing on his motion to vacate sentence pursuant to Title 28, United States Code, Section 2255.

2. Was the in-court identification of Charles Hedges by Bourbonnais a deliberate misleading of the jury and grossly prejudicicial to the Petitioner.

3. Was the Petitioner deprived of the right to effective counsel because he was unprepared to cross-examine the Government's witness.

4. Was the Petitioner's right to testify in his own behalf improper-

ly frustrated by the trial judge's insistence that he be tried jointly with his brother.

5. Should the trial judge have granted Petitioner's motion pursuant to Title 28, United States Code, Section 144, and recused himself?

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Sixth Amendment of the United States Constitution and 28 U.S.C. 2255 and 28 U.S.C. 144 which are involved are set forth in the Appendix at pp. A-24-25.

STATEMENT OF THE CASE

Petitioner was found guilty at a jury trial of conspiracy to import narcotics in violation of Sections 173 and 174 of Title 21, United States Code, on April 15, 1969. That trial arose out of an indictment handed down in 1964 that charged 28 persons, twelve named as defendants and 16 named as co-conspirators. The first jury trial was held in 1965 before Judge Bonsal for six of the major Defendants, in which four were convicted. United States v. Armone, 363 F.2d 385 (2nd Circ.), cert. denied, 385 U.S. 957 (1966).

The Government had charged in the indictment that the conspiracy

continued in existence from 1956 to 1964. It allegedly consisted of three subgroups: the exporters, the receiving agents and the wholesalers. (See diagram in Appendix, pp. A-26.)

The Exporters

There were allegedly three separate sets of European exporters, each of whom had their own courier or couriers. The first was the Aranci brothers of Marseilles. Their courier was Clarence Aspelund, a ship's baker employed by American Export Lines. The second exporter was Felix Barnier of Paris. His couriers were Charles Bourbonnais, a flight purser for Trans-

World Airlines, and Maurice Rosal, a Guatamalan ambassador. The third exporter was unnamed. The couriers for this individual were Georges (a/k/a Pierre) Roulet and Georges Henripierre, both employees of Air France.

The Receiving Agents and Wholesalers

The Government alleged that the original deliveries were made to Joseph Cahill. Later, Cahill employed Charles Hedges to accept delivery for him. Some time before September 1959, the exporters fired Cahill and substituted Nicholas Calamaris as receiving agent. The import group allegedly included Joseph Armone, Stephan Grammauta

and Arnold Romano, the Petitioner's brother. The Petitioner himself, Dominick Romano, was not alleged to be a full-fledged member of the import group. Along with one Frank Sherbicki, he was merely alleged to have "performed services" for the import group.

Wholesale Distributors

The wholesale group allegedly consisted of Vincent Pacelli and Michael Ricucci. Carmine Guanti received narcotics on behalf of the wholesalers from the importers.

The Overt Activities

The Government alleged that in 1956, Clarence Aspelund, the courier of the Aranci brothers, met Joseph Cahill in New York, and it was agreed that Aspelund would begin deliveries to Cahill. Aspelund began to bring the heroin to his home, where Cahill would pick it up.

The Petitioner was implicated in the conspiracy by Hedges' testimony. According to his testimony, sometime in 1958 Cahill met Charles, and both men took rooms in the Vanderbilt Hotel. From there they dealt with Aspelund. In the course of that transaction,money was obtained from Petitioner's brother, Arnold Romano. Hedges received several

packages from Aspelund which were delivered to Charles Guanti.

Deliveries from Roulet

The Government alleged that, in June 1958, Hedges and Cahill met Georges Roulet at Rockefeller Center, where Roulet gave Cahill a package. Three weeks later, Cahill allegedly reserved a suite at the Fifth Avenue Hotel, where Roulet delivered two large glassine bags of white powder. Cahill left Hedges in the room with the package. In the Petitioner's trial, Hedges testified that Dominick Romano merely came into the room, punctured one of the packages, took

a sample of the white powder, and left after placing it into two envelopes. However, in the prior Armone trial, Hedges testified that he himself received the samples and that the Petitioner, Dominick Romano, took possession of the large glassine bags.

Following that incident, Petitioner's brother, Arnold Romano, Cahill, Hedges, Henripierre and Roulet were involved in various dealings. Hedges met Roulet ten, twelve or thirteen times during which he paid Roulet for the delivery of packages. Hedges also met Henripierre six or seven times. Arnold Romano and Cahill were also involved in several dealings with

Hedges. They picked up two (2) suitcases at Grand Central Station, and Hedges helped Arnold Romano make two package deliveries.

Sometime in December 1958, Hedges was again staying at the Commodore Hotel, awaiting a delivery from Henripierre. Hedges testified that Dominick Romano, the Petitioner, came to the room where Hedges allegedly told him, "You are in a trap here! This guy could be followed and you are just trapped. You can't get out of it." Petitioner allegedly left but later returned. Hedges then told him, "Get the hell out of here! The guy didn't come. They will think we are running a book-

making ring here, the house detective or something." It was in Hedges' testimony that Dominick Romano replied "that he was going to take this over, you know, he was going to meet these guys in the hotel from now on, you know."

Hedges further testified that sometime in 1959, he and Joe Cahill went up to East Harlem, because Pacelli and Ricucci wanted to see Cahill. Hedges testified that Pacelli and Ricucci had related to him, "Dom, he comes up with a broad sitting in the car, and he hands me a package right on the middle of Pleasant Avenue and 117th Street on 116th Street."

Deliveries from Charles Bourbonnais

Back in July or August 1957, Bourbonnais had arranged to meet Cahill in the Plaza Hotel. After identifying themselves, Bourbonnais allegedly arranged to and did on several occasions deliver packages to Cahill. Bourbonnais testified that they also had used a meeting place in Queens and met altogether 20, 25 or 30 times over a period of a year to a year and a half. He testified that the last delivery was made to Cahill no later than the early part of 1959.

Bourbonnais testified that he met Hedges around the early part of

1959, at about the same time that he stopped seeing Cahill. Bourbonnais had arranged to meet Cahill on 55th Street and First Avenue, but Hedges appeared instead, telling Bourbonnais, "I am coming in place of Joe." Hedges got into the car and gave Bourbonnais a small sum of money. Then, Hedges met Bourbonnais two or three weeks later at LaGuardia Field in the airlines parking lot. According to his testimony at the Appellant's trial, Bourbonnais gave Hedges two (2) large suitcases and Hedges gave Bourbonnais $100,000.

At the trial, Bourbonnais expressly stated that he had been given

three (3) suitcases on each of two occasions by Gilbert Coscia, a named co-conspirator. On the first occasion, he drove up to the Park Chambers Hotel, and the bellhop brought out the suitcases. On another occasion, Coscia and Bourbonnais drove to Pennsylvania Station and removed three (3) suitcases from a locker where Coscia had placed them. Bourbonnais testified that he gave one suitcase to Cahill and the remaining two to Hedges at their respective meetings. The other three suitcases he gave to a new agent, one Nicholas Calamaris, at yet another exchange. However, Bourbonnais testified at the Armone trial that, of the

three suitcases he first received from Gilbert Coscia, "two suitcases I gave to Cahill and one of them I took packages out that were wrapped up in three or four kilo packages and upon instructions from Mr. Barnier, according to the amount he would receive in exchange, he would say, 'Give me so many packages, so many kilos.'

"Q. This is Cahill.

"A. Yes, sir, this is Cahill."

Bourbonnais further testified that he had previously told narcotics agents that he gave all three suitcases from that first delivery from Coscia to Cahill in bulk.

Bourbonnais also testified that

at one time, although he could not remember when, he had testified that he took all three suitcases home and doled them out piecemeal to Cahill.

Bourbonnais later admitted that he had previously told the prosecutors, in answer to their questions, that he gave one suitcase in bulk to Cahill. The other two he doled out periodically on instructions from Barnier. He stated also that he delivered two suitcases to Calamaris in bulk; 1 suitcase to Calamaris in piecemeal fashion.

On October 3, 1960 Bourbonnais, Calamaris and another man named Tarditti met Rosal at 72nd Street and Lexington Avenue. They were arrested by fe-

deral agents, who found 52 kilos of narcotics in the trunk of Rosal's taxi.

The Prosecutions

Charles Hedges and Joseph Cahill were prosecuted in Connecticut in 1961. Cahill fled after the beginning of trial and was tried in absentia. Charles Bourbonnais testified at the trial but was unable to give evidence against Hedges. Hedges and Cahill were convicted, and Hedges received a sentence of 15 years in prison. The convictions were affirmed by the Court of Appeals for the Second Circuit in United States v. Cianchetti, 315 F. 2d 584 (1961).

Narcotics agent Thomas Dugan,

who was in charge of the investigation of the case of Charles Bourbonnais and was present at the arrest and trial of Charles Hedges, visited Hedges in prison and questioned him. Subsequently, Hedges' appeal bond was lowered and Hedges was released. Dugan and Hedges met many times while Hedges was free. His conviction was affirmed and Hedges was reincarcerated. However, his attorney made an application for reduction of sentence and the trial judge, Judge Timbers of the United States District Court for Connecticut, reduced the sentence to five years.

Early in 1962, Charles Bour-

bonnais was transferred from Danbury Federal Penitentiary to California, but he was brought back to testify at the Sachs-Mazza trial.

At this time he was brought to the office of Assistant United States Attorney James Tendy. Bourbonnais was asked to identify Charles Hedges in a face-to-face confrontation but was unable to do so. Finally, Hedges told him who he was and related a story of their meeting.

One month after the Grand Jury handed down an indictment in the present case, Bourbonnais' sentence was commuted by the President.

The Indictment and Trial

The indictment obtained in 1965 charged 28 individuals with conspiracy to import narcotics in violation of §§173 and 174 of Title 21, United States Code.

Dominick Romano, the Petitioner, was not even arrested until 1968. At that time, the Petitioner was 50 years old, an honorably discharged veteran of World War II, and had never previously been arrested. He was brought to trial on March 3, 1969 with his brother, Arnold Romano, Carmine Guanti, and Frank Sherbicki. Trial was held before Hon. Lloyd F. MacMahon in

the Southern District of New York. Michael Querques, retained counsel of Arnold Romano, Petitioner's brother, was unable to appear at that time, because he was unexpectedly involved in a New Jersey trial. Judge MacMahon, in full knowledge of the unusual and uncontrollable circumstances which caused the conflict, refused to delay the case and appointed David Markowitz, Esq. as Arnold Romano's trial counsel. In the strategy contemplated jointly by defense counsel, Querques was to have carried the major burden at trial. Therefore, his unavailability left the other defense-team attorneys relatively unstudied and unprepared, particularly for

cross-examination in a case of such factual complexity.

James LaRossa, Esq., counsel for Dominick Romano and Mr. James Hanrahan, counsel for Carmine Guanti, expressly stated to the court that it had been the agreement among counsel that Mr. Querques would conduct the important cross-examination of Charles Hedges and that his absence left the defense unprepared to proceed in this regard, and Mr. Friedman, counsel for Frank Sherbicki, also joined in the motion.

Arnold Romano refused throughout the trial to allow Mr. Markowitz to represent him and insisted upon standing mute. In light of Arnold Romano's lack

of counsel and given the additional fact that the Government intended to introduce evidence of flight to avoid prosecution against Arnold Romano, Petitioner's brother, Petitioner's attorney, Mr. LaRossa, moved alternatively for the severance of Dominick's brother, Arnold Romano, or the severance of Dominick Romano, the Petitioner. The motions were summarily denied from the bench.

Jury Deliberation

The jury commenced deliberations at 12:37 P.M. on March 13, 1969. At 4:00 P.M., the jury returned and requested that it be recharged as to the three

elements of conspiracy which Judge MacMahon had previously given them. The jury resumed deliberations at 4:05 P.M.

The jury returned at 6:35 P.M. and requested a copy of overt acts 10 and 11, as they appear in the indictment, and two parts of Charles Hedges' testimony. Specifically, the jurors wanted to hear Hedges' testimony regarding (1) Carmine Guanti's receipt of packages and dates thereof, and (2) Domonick Romano's delivery of the packages when in a car with a girl and dates thereof. The jury resumed deliberation at 6:55 P.M.

At 9:00 P.M. on March 13, the prosecution made application for a

clarifying instruction to be given to the jury with respect to the overt act requirement. Mr. Leisure, for the Government, sought to have the jury charged that the overt act requirement was satisfied if "some overt act was performed by any coconspirator or any member of the conspiracy within the period of limitations" and, further, that the overt act committed need not be one charged in the indictment. The court refused to give this clarifying instruction, stating that he would not give the jury the little push prosecution obviously wanted.

At 9:40 P.M. the Judge sequestered the jury for the night. at 12:20

P.M., March 14, the jury was brought back to court. The jurors requested to have read Mr. LaRossa's (Petitioner's counsel) summation which the court refused to give them. At this time, Judge MacMahon gave the jury a clarifying instruction as to overt acts. He instructed the jury that, once the Government proved that the defendants knowingly joined in a conspiracy, "it is not necessary for the Government to prove that a defendant himself did anything or that he ever committed an overt act ... (the Defendant) ... is bound by it, if it was done by a coconspirator, any other member of the conspiracy in furtherance

of the objectives.

"The two overt acts here, you will see if those were done by any member of the conspiracy, not whether they were done by any of these defendants on trial. That isn't the question.

"Has the Government proved beyond a reasonable doubt that they were done by any member of the conspiracy?"

The jury resumed deliberations at 12:25 P.M. The jury returned at 12:30 P.M. with a verdict of guilty as to all four defendants.

On April 15, 1969, Judge MacMahon sentenced Dominick Romano to 20 years in prison, the maximum penalty and a $5,000 fine. Appeal was taken to

the Court of Appeals for the Second Circuit, and the convictions were affirmed in United States v. Guanti, 421 F. 2d 792. A petition for certiorari was denied by the Supreme Court on October 12, 1970.

Petitioner filed a pro se petition to vacate sentence pursuant to § 2255, Title 28, United States Code. The petition was denied by Hon. Lloyd F. MacMahon on January 5, 1972. This appeal is taken from that decision.

REASONS FOR GRANTING THE WRIT

P O I N T I

THE PETITIONER IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 2255.

28 U.S.C. 2255 reads in part:

"...unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief the court shall... grant a prompt hearing, determine the issues and make findings of fact and conclusions of law with respect thereto."

A hearing is required on a motion to vacate sentence pursuant to 28 U.S.C. 2255 whenever issues of fact are presented. Pettway v. United

States, 216 F. 2d 106 (6th Cir. 1954); Yates v. United States, 316 F. 2d 718 (10th Circ. 1963).

In the present case, Petitioner claims that his conviction was obtained through the knowing use of perjury by the prosecution. In contract to the Petitioner, who has never been arrested or convicted and who has served his country, the witnesses who testified against him are confessed narcotics smugglers.

Charles Hedges, the primary witness against Appellant, has a criminal record dating back to the time he was 13 years old. At 14 he was incarcerated for two years and eight months

in the New York State Training School. Hedges has been separately convicted of assault on a police officer, several burglaries, and possession of a weapon without a license.

Hedges originally received a sentence of 15 years in jail and a $10,000 fine in connection with a plea of guilty to violations of the Federal Narcotics Laws. However, that sentence was reduced to five years imprisonment and Hedges was paid a $3,000 reward through the intervention of the United States Attorney following Hedges' agreement to testify at the trial of Dominick Romano and in a previous narcotics trial (U.S. v. Armone).

Charles Bourbonnais is a confessed perjurer. Boubonnais has admitted that he lied to the grand jury, that he lied to the United States Attorney and that he concealed evidence from both the grand jury and the United States Attorney. In his petition to the President of the United States for commutation of sentence, he swore that, within a few days of his arrest, he had decided to cooperate with the United States Government; yet, he continued to lie, conceal facts and take the Fifth Amendment until 1965, fully five years after his arrest.

Mr. Bourbonnais was originally sentenced to nine years imprisonment,

and his sentence was reduced to time served after four years, through the intervention of the United States Attorney, following Bourbonnais' agreement to testify.

Both these witnesses, therefore, had abundant motives to tailor their testimony in accordance with the desires of the United States Attorney, and both were significantly rewarded for their efforts in having testified accordingly.

An allegation under Section 2255 that the prosecutor knowingly used perjured testimony and that the testimony had a ritual effect on the verdict is a sufficient ground to entitle Peti-

tioner to a hearing upon the charges. Smith v. United States, 259 F. 2d 125 (9th Circ. 1958); Simpson v. Teets, 353 U.S. 926 reversing 239 F. 2d 890 (9th Circ. 1956) and United States v. Derosier, 229 F. 2d 599 (3rd Circ. 1956).

The Petitioner-Appellant alleged that both witnesses against him committed perjury. There can be no doubt that the testimony of these two witnesses had a vital effect on the verdict as to the Petitioner, since only one of them made any allegations whatsoever against Dominick Romano and the other testified falsely to enhance the credibility of the former. The untruth

of the testimony was known to the prosecutor and was knowingly used or demonstrated on the next point. The allegation is clearly not "frivolous" in light of the admissions of the witnesses themselves. Their character, the testimonial rewards, and the minimal reliability of informants have always been considered in narcotic cases to be treated with grave suspicion and doubt.

As a basis for its decision, the lower court characterized the Petioner's prose petition as conclusory, speculative and lacking in all specificity. The Court of Appeals accepted this basis, saying, "No evidence of perjury is noted and no false testimony is

cited."

This decision is in conflict with the holding of the Seventh Circuit Court of Appeals regarding specificity of a Section 2255 petition as announced in Burris v. United States, 430 F. 2d 399, 402 (7th Circ. 1970): "It is difficult in many instances to require great specificity and persuasion in a Section 2255 petition.. Where, as here, the allegations involve factual matters outside the record and beyond the ready knowledge of the district judge, summary denial of a petitioner's allegations is questionable."

Petitioner alleged that the entire testimony of both witnesses against

him were replete with perjurious statements and, in particular, all testimony implicating the Petitioner and the identification of Hedges by Bourbonnais was, of necessity, perjurious. The paucity of such references makes it a simple matter to determine which statements the Petitioner claims to be false.

Only the testimony of Charles Hedges implicated the Petitioner; thus it would be difficult to determine from the record alone that his statements were perjurious. Contradictions and untruths could only be proved by comparison with other evidence such as testimony in prior trials and in other situations, by the witnesses. This re-

quires a hearing where new and additional testimony may be introduced to prove perjury by Hedges and Bourbonnais. Mr. LaRossa, Petitioner's attorney in the district court trial, was not prepared to elicit such testimony and provide such evidence at the trial as explained fully in Point III.

In considering such a situation, the Supreme Court said in Machibroda v. United States, 368 U.S. 487, 494-495: "[T]he factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon

which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge and recollection."

The Petitioner here is a middle-aged World War II veteran with a previously unblemished record. However, the length of his sentence is such that he may never again be a free man. His conviction was based on the testimony of two men of admittedly criminal character. Significantly, that testimony was admittedly in major conflict with even prior testimony of the same witnesses. The Petitioner knows that only the perjury

of these two men, not any guilt on his part, stands between him and freedom. All he now seeks is an opportunity to testify - which he never actually had - and to demonstrate and prove the extent of the perjury as well as to prove his innocence.

In view of the age and record of the Petitioner, the severity of the punishment given him, the statements of the witnesses themselves regarding their previous testimony, and the significant consideration given these witnesses by the United States Attorney, a hearing is clearly mandated in the interests of justice to determine whether perjury, among other injustices, is in fact why

Petitioner Dominick Romano was and is incarcerated. The preservation of the integrity of the factfinding process should, standing alone, constitute sufficient cause for the holding of such a hearing.

P O I N T II

THE IN-COURT IDENTIFICATION OF CHARLES HEDGES BY CHARLES BOURBONNAIS WAS A DELIBERATE MISLEADING OF THE JURY AND GROSSLY PREJUDICED THE APPELLANT.

Charles Bourbonnais testified at the trial that he twice met Charles Hedges and on the second occasion made a delivery of narcotics to him. The delivery involved an exchange of over

$100,000. Bourbonnais' identification immeasurably enhanced the testimony of Charles Hedges. It allowed the prosecution to present Hedges as the next link in a conspiratorial chain leading to Dominick Romano. The entire case of the prosecution hangs beautifully together if the witnesses had readily identified one another. This progression fails disastrously if one witness is unable to identify the other, as a doubt must be cast on their credibility and their ability to recollect accurately.

Charles Bourbonnais identified Hedges as the man to whom he made a large delivery of narcotics for which

he was paid $100,000. He gave a complete and convincing narrative of the events, first claiming to recognize the name Charles Hedges, and later to recognize a picture of Hedges. His testimony thus appeared as an accurate and total recollection. A very different impression indeed might have been made if Bourbonnais had testified that, in truth, he could not independently recognize either the name or the face of Charles Hedges and from 1960 to 1964, although shown Hedges' picture on many occasions by Agent Dugan, as was his solemn and sworn testimony at the Armone trial. Unfortunately, the only defense attorney who might have been able to confront the

witness with these prior inconsistencies was not able to participate in the trial, as is explained in the next point.

The Supreme Court has frequently ruled that a one-to-one pretrial confrontation of a witness and a defendant, in which the accused is identified either expressly or by suggestion to the witness, will taint the in-court identification of the defendant by that witness. U.S. v. Wade, 388 U.S. 218, Stovall v. Denno, 388 U.S. 293. Similarly, any pretrial confrontation between witness and defendant at which the identity of the defendant is suggested to the witness may invalidate an in-court identification if no independent ground

of identification is proved. Gilbert v. California, 388 U.S. 263; U.S. v. Wade, supra. It is inconceivable that the suggestiveness of one "witness" relating the events of meeting to another "witness" cannot be recognized by the Lower Court.

The court below misunderstood Petitioner's argument, construing it to be that he was denied counsel at an identification procedure but the argument actually is an extension of the rationale which formed the basis of the Wade decision. That rationale was that impermissibly suggestive confrontation cements the identification in the mind of the witness and any later identifi-

cation is necessarily colored by this suggestive confrontation. (388 U.S. 229). The psychological principle applies no less to an identification of one witness by another. The only questions are whether the Defendant has a right to be protected from the effects of such confrontations and, in the instant case, more importantly, whether he was prejudiced thereby.

The presentation of identification evidence is the same as the presentation of any other evidence. The same demands for truthfulness must be applied. The testimony of Charles Bourbonnais deliberately misled the jury. Independent of the confrontation in the

prosecutor's office, Bourbonnais could not recognize Hedges. Yet, at trial he said he recognized the name Charles Hedges and identified his picture, something he could not do before the meeting in Tendy's office, leading the jury to believe something which was clearly not true--that Bourbonnais remembered Charles Hedges as the man to whom a large delivery of narcotics was made. Such tactic improperly lent credibility to both Bourbonnais and Hedges and unavoidably added new dimensions unfavorable to the Petitioner in the eyes of the jury. Thus, the prosecution was permitted to structure false and inaccurate evidence which intentionally led

the jury to draw incorrect inferences.

Any question of the sufficiency of prejudice to the Petitioner Dominick Romano may be resolved by an analysis of the importance of Charles Hedges in linking Romano to the overt acts allegedly committed after the running of the Statutue of Limitations. Hedges is the only figure on this side of the Atlantic common to all the conspirators charged as "importers." The Government and this Court held, in its decision affirming the conviction, 421 F. 2nd 799, that there was but one import group consisting of different members, like a "theatrical performance in which many actors enter upon the stage to play

their assigned roles and, having fulfilled their parts, they withdraw." 421 F. 2d at 799. This Court characterized Calamaris as a mere link, the change of which would not create separate conspiracies.

Even accepting the Court's single-play-single-conspiracy analogy, it remains apparent that the Petitioner was prejudiced by inappropriate procedures. If the respective regimes of Cahill and Calmaris may be characterized as Acts I and II of the "single conspiracy" play, then in the interlude between the two, the Statute of Limitations descended like the curtain and the 1963 Grand Jury found no indictment

against Petitioner. With the exception of Hedges, who appeared in both Acts I and II, the identity of the actors was different at the American Receiving Agents level. Hedges' only testimony against the Petitioner linked Dominick Romano with Cahill in Act I. Simply because Hedges appeared after the Statute of Limitations does not pull Cahill and his associates onto the stage in Act II and subject them to possible prosecution.

However, because Hedges is the only possible link between the prosecuted conspiracy and Dominick Romano, it is obvious that any testimony whatsoever as to Hedges' role and activi-

ties is of vital concern to the Appellant. As Bourbonnais' testimony implies that Hedges is the conspiring and continuing link between the Cahill group and the Calmaris group, the Petitioner was most directly prejudiced by any falsification of evidence therein. Just as Bourbonnais was permitted to contradict his own prior sworn testimony and "buttress" the Government's case, so was the jury misled and the Petitioner improperly convicted.

An evidentiary hearing will prove that a 1963 Grand Jury failed to find an indictment against the Petitioner. However, in 1964, Bourbonnais was prepared to give perjured testimony in ex-

change for his freedom and, thus, an indictment was found against Petitioner.

P O I N T III

THE PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE COUNSEL BECAUSE HIS ATTORNEY WAS UNPREPARED TO CROSS-EXAMINE THE GOVERNMENT'S WITNESSES.

Michael Querques, the retained counsel of Arnold Romano, Petitioner's brother, was unable to appear when the trial began. Mr. Querques was unexpectedly on trial in New Jersey. The New Jersey case had been delayed by a restraining order issued by the Third Circuit Court of Appeals on January 7, 1969.

The full appeal on that matter was argued on February 7, 1969, twenty-four days before the proposed trial date. At 3:00 P.M. on February 28, 1969, the Friday before both trials were scheduled to begin, the Third Circuit issued an opinion adverse to the New Jersey defendants. The Clerk of the Third Circuit notified all counsel and the Judge of the U.S. District Court of New Jersey that the restraining order had been vacated with a specific provision against any further stays, even pending a petition to the Supreme Court for certiorari. Querques was thus unexpectedly involved in two trials scheduled to begin simultaneously. He notified the

U.S. Attorney prosecuting the instant case.

On Monday, March 3, Mr. Querques sought to be excused from the New Jersey trial so that he could appear and defend Arnold Romano in the instant case. The Trial Judge refused but did telephone Judge MacMahon to explain what had happened.

Judge MacMahon refused to delay the trial so that Arnold Romano could be represented by his retained counsel. David Markowitz, Esq. was appointed as Arnold Romano's counsel, over his continued objections but on the motion of the prosecutor. Mr. James LaRossa, counsel of record for Dominick Romano, and Mr.

James Hanrahan, counsel for Carmine Guanti, and Mr. H. Howard Friedman, attorney for Frank Sherbicki, told the Court that the absence of Mr. Querques grossly prejudiced their clients insofar as Mr. Querques was supposed to carry the major burden of the cross-examination of Charles Hedges.

It is clear from the statement of counsel that the defense was to be conducted as a team effort. Indeed, defendants in joint trials frequently have little alternative but to conduct a team defense. Such matters as the joint use of peremptory challenges by majority ballot force the defense to cooperate. This is particularly true

in a conspiracy trial where the defendants are charged with acting jointly to achieve a common purpose. Alas, the conplexity of the instant case demanded that a team effort be used to allow the defense attorneys to adequately prepare for trial within a time period.

Mr. LaRossa and Mr. Hanrahan stated expressly that the defense attorneys in this case had worked out agreements as to the portions of the trial which were to be handled by each counsel. Mr. LaRossa and Mr. Hanrahan also stated to the Court that it had been the clear understanding among counsel that Mr. Querques would conduct the bulk of the cross-examination of Charles

Hedges, the chief Government witness, and the only witness to give evidence against Dominick Romano. The forced absence of Mr. Querques, one of the members of the team, from participation in the trial, in effect, deprived the Petitioner of a planned and appropriately effective cross-examination in perhaps the most vital phase of the trial. In addition, Mr. Hedges was the lead-off witness for the Government so that Mr. LaRossa, Appellant's counsel, was forced to conduct his cross-examination on March 4, 1969, only one day after hearing of the judge's insistence on proceeding. The obvious complexity of the case, the numerous parties involved,

the extensive prior proceedings and the quantum of Mr. Hedges' testimony made it impossible for any experienced counsel to properly protect his client's rights.

This is not a case in which the Court is left to conjecture about the ability or competency of counsel. Mr. LaRossa and Mr. Hanrahan, both respected members of the bar, expressly stated that the absence of Mr. Querques and the necessity of shifting the cross-examination to another member of the defense team prejudiced their clients. The fact that the cross-examination does not appear so grossly incompetent as to make a "sham or mockery" of the trial is

quite doubtful in view of the conviction of Petitioner on such incredible perjurious testimony. It is not proof of the effectiveness of cross-examination. The Petitioner does not argue that the brevity of the questioning or decisions by counsel in themselves deprived him of an effective cross-examination. However, the Petitioner does claim that the Court's insistence on proceeding, as augmented by the prosecution tactic which immediately placed the single most important witness on the stand within twenty-four hours, was inherently unfair in light of the expressed and obvious lack of preparation by Mr. LaRossa to conduct that cross-examination, and the

prosecutor's failure to keep his promise to Judge Cooper to make whatever 3500 material available as far in advance of trial as possible when he produced said material consisting of 85 pages of handwritten notes ten minutes prior to trial.

In Glasser v. United States, 315 U.S. 60, the Court, commenting on a claim of ineffective counsel, said, "In all cases, the Constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. There, error, which under some circumstances would not

be ground for reversal, cannot be brushed aside as immaterial since there is a chance that it might have provided the slight impetus which swung the scales toward guilt."

Certainly, the question of the guilt of Dominick Romano was such a delicately balanced proposition. There was but slight and suspect evidence linking him tangentially to the alleged conspiracy. All that evidence was given by Charles Hedges, whose cross-examination Petitioner was not able to destroy sufficiently or effectively. Even after hearing what evidence was presented, the jury was obviously in doubt as to Dominick Romano's guilt. After delibera-

tions had begun, the jurors halted to request a crucial piece of evidence about Romano and later asked that the summation of Petitioner's counsel, Mr. LaRossa, be provided to them. When the case against Romano was so obviously borderline, a more effective, organized and prepared cross-examination would, without doubt, have avoided the "slight impetus which swung the scales" to convict the Petitioner.

P O I N T I V

THE PETITIONER'S RIGHT TO TESTIFY IN HIS OWN BEHALF WAS IMPROPERLY FRUSTRATED BY THE TRIAL JUDGE'S INSISTENCE THAT HE BE TRIED JOINTLY WITH HIS BROTHER.

The trial court insisted upon trying the Petitioner, Dominick Romano, jointly with his brother, Arnold, despite his counsel's motion to sever either the case of Arnold Romano or the case of Dominick Romano. Petitioner's fundamental right to testify and to be heard by the jury was critical in this case. This fact became positive and clear when the jury--during its deliberations (even though Petitioner did not testify)--asked that Petitioner's counsel's summation be read to the jury.

This request was denied by the Trial Judge.

Petitioner wanted to testify to prove his innocence. Petitioner did not

have the slightest fear of prejudicing himself by the cross-examination of the prosecutor.

Petitioner pleads with this Court to give him the opportunity to testify and be heard at an evidentiary hearing.

He has offered and is offering to be given a polygraph test by the Government's polygraph experts. Petitioner will stipulate that the results and testimony of Government's polygraph experts be considered as admissible evidence and be binding upon him.

Petitioner has never been arrested or convicted of a crime, whereas Arnold Romano, Petitioner's brother, had

a significant criminal record. An evidentiary hearing will prove that Petitioner's trial counsel was forced into a very difficult decision by the Trial Court's denial of his motion to sever the case from Appellant's brother, Arnold.

Petitioner was told by his trial counsel that, if counsel put Petitioner on the stand to testify--even though he could prove his own innocence to the jury--the cross-examination of the prosecutor would undoubtedly cast positive inference of guilt against his brother, Arnold.

This could be easily accomplished by the prosecutor by questioning the

Petitioner in detail about his brother Arnold's alleged illegal activity. Furthermore, his brother, Arnold, did not intend to testify--the inferences of Arnold's guilt would thus be positive and overwhelming.

Hence, Petitioner's trial counsel made the unfortunate decision for Petitioner to keep him off the witness stand and not testify.

It is the Petitioner's position that the Trial Court, in refusing the severance plea, thus unfairly placed him in a position where his trial counsel forced him to remain silent in front of the jury.

Thus, the Petitioner's right to

testify in his own behalf was completely frustrated by the Court's denial of the severance motion, abridging Dominick Romano's right to a fundamentally fair hearing, to procedural due process, and to the effective assistance of counsel. It is respectfully submitted that these decisions by the Trial Court and his trial counsel did in fact substantially destroy every semblance of fairness of his trial. He was procedurally forced to forego, for no sufficiently compelling reason, what would have been customary, logical, and proper for the defense of a person wrongfully accused by confessed perjurers.

P O I N T V

THE TRIAL JUDGE SHOULD HAVE GRANTED PETITIONER'S MOTION PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 144, AND RECUSED HIMSELF.

The lower Court denied the Petitioner's motion to disqualify the judge pursuant to 28 U.S.C. 144. The Court found that the grounds stated in the petition were insufficient, since they failed to establish a bias or prejudice of a personal nature, and of extrajudicial origin as opposed to one acquired during the trial. Judge's memorandum A-16 citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Wolfson v. Palmieri, 396 F. 2d, 121, 124 (2nd Cir. 1968); Rosen v. Sugarman, 357

F. 2d, 794, 797, 798 (2nd Cir., 1966), other citations omitted.

It is respectfully submitted that this interpretation is a misunderstanding of the relevant case law. The decisions do hold that the bias must stem from an "extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." U.S. v. Grinnel, 384 U.S. at 583.

However, it is not required that the bias predate or originate outside the proceedings. In Rosen v. Sugarman it was alleged that the bias or prejudice arose from conflicts within the

courtroom during the proceedings, not from history antecedent to the litigation or the judge's contacts outside the courtroom. While rejecting the claim on other grounds, the court said that "where the antipathy has crystallized to a point where the attorney could do no right, the judge will have acquired a bent of mind that may prevent or impede impartiality of judgment." 357 F. 2d, at 798.

Similarly, in Wolfson v. Palmieri, the Court held that comments made during a trial were relevant to the issue of bias and contacts during the trial may have created a degree of irritation with a party or his lawyer as

to necessitate disqualification. 396 F. 2d, 124.

Clearly, occurrences during trial are proper evidence of bias or prejudice. Furthermore, instances in the trial can form the basis for a bias requiring the disqualification of the judge. It was, therefore, error to hold the Petitioner's grounds for disqualification as insufficient merely because the claimed bias arose during the course of the trial.

The lower Court has erroneously characterized the instances of bias cited by the Petitioner as "nothing more than that the court's overruling of objections or denying motions by his coun-

sel or other defense attorneys, which Petitioner claims were erroneous." Judge's memorandum (A-17).

The petition referred specifically to personal chastisements and sarcastic comments made by the judge in the presence of the jury in regard to objections raised by defense counsel. (Amendment to Petition pursuant to 28 U.S.C. 2255, Court of Appeals for the Second Circuit at pages A-55-58). Obviously, it is these comments and not the mere "overruling of objections and the denying of motions" which form the substantial basis of Petitioner's claim of bias.

Thus, the Trial Court's defense

of his rulings does not dispose of the question of bias. Certainly, the rulings could all be correct; yet, the accompanying remarks evidence a bias or prejudice in the mind of the judge. The correctness of the rulings, if indeed they are correct, cannot carry along and obliterate the accompanying disparaging remarks.

The remarks remain as evidence of the judge's irritation with the defendant and defense counsel. In fact, that bias and irritation might have been communicated to the jury more authoritatively, dramatically and prejudicially, because it was included within certain rulings by the Court.

The issues of this nature most commonly arise during the course of trial. Interestingly, all the cases cited by the Lower Court in its opinion involved such situations. There is an obvious and justifiable reluctance to disqualify a judge who has acquired a working knowledge of a case as it would necessitate a mistrial. However, that rationale is not applicable where, as here, the disqualification was requested at the outset of a subsequent proceeding before the trial judge and not made during the course of the trial itself.

Certainly, there is a human temptation on the part of a judge in such a

situation as this, to apply knowledge acquired during the trial to the determination of the merits of the instant claim. And where it is argued and documented that the judge has fallen prey to emotional imbalances which influence his partiality, the Petitioner should not be denied a meaningful review by the invoking of a legal fiction which ignores psychological realities and presumes that all judges are fair and impartial by virtue of their training and experience.

Congress has entrusted to the trial judge the initial decision on a motion to vacate sentence. However, where, as here, some of the factors in

support on the motion have reference to the judge's rulings and conduct, his application of previously acquired knowledge cannot help but destroy impartiality. In addition, as to the motion proceeding itself, the opinions developed during trial are extrajudicial.

Proof of the carryover and its effect in the Petitioner's case lies in the fact that the Lower Court made findings of fact as to the allegations in the motion to vacate, based not on evidence adduced at a hearing, but instead, on his recall of the occurrences during trial. For example, solely on the basis of the record and despite the fact that proof of perjury will rarely appear

on the record itself, the Court summarily dismissed the allegation that perjury had been committed.

The Petitioner's references to the record in his allegations were not intended to be the complete extent of his proof but were offered only to give the required specificity to his petition. It is respectfully submitted that the testimonial conflicts outlined in the Petitioner's motion papers were significant and indicate manufactured and perjurious evidence. This merits objective and disinterested judicial review, which was denied the Petitioner.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ROTHBLATT, ROTHBLATT,
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Attorney for Petitioner

STEPHAN H. PESKIN
on the Brief.

MEMORANDUM OPINION OF MACMAHON, D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DOMINICK ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
----------x

PRO SE

71 Civ. 2851

MEMORANDUM

38153

MacMahon, District Judge

Petitioner Dominick Romano was one of four defendants convicted by a

jury after a two-week trial of conspiracy to import and distribute huge amounts of heroin into the United States from France, in violation of the federal narcotics law. The judgments were affirmed on appeal. United States v. Guanti, 421 F. 2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970). Petitioner's trial was the second to arise from a single indictment filed in 1964 because petitioner and his three co-defendants were fugitives at the time of the first trial (hereinafter "Armone trial"). See United States v. Armone, 363 F. 2d 385 (2d Cir.), cert. denied,

385 U.S. 957 (1966).

Petitioner now moves for post-conviction relief, pursuant to 28 U.S.C. § 2255, for an evidentiary hearing, for an order vacating a judgment of conviction and sentence imposed upon him on April 15, 1969, and for disqualification of the trial judge from hearing and determining these proceedings for bias and prejudice. We deny the petition in all respects.

Petitioner's application, originally submitted pro se but later amended by retained counsel, is not a model of clarity. It contains twenty-eight

pages of bald conclusions, unsupported allegations, rank speculation, material misstatements of the record and rambling dissertations on the law. The application purports to list twelve separate violations of petitioner's constitutional rights, but after careful scrutiny we find many of them repetitious.

We shall first consider whether petitioner is entitled to a hearing.

We are required to hold " 'a prompt hearing' when the allegations of deprivation of constitutional rights raise disputed issues of fact in order

to 'determine the issues and make findings of fact and conclusions of law' with respect to them 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' 28 U.S.C. § 2255 . . . ." United States v. Malcolm, 432 F. 2d 809, 812 (2d Cir. 1970), and cases cited therein.

Evidentiary hearings are not required, however, on nonconstitutional claims, nor on constitutional claims which have been adversely decided by a trial or appellate court. Kaufman v. United States, 394 U.S. 217, 227 n. 3

(1969). Constitutional claims, despite previous consideration or previous opportunity for consideration, do require an evidentiary hearing "(1) where a federal trial or appellate court said nothing because the issue was not raised; (2) where it was unclear whether the 'say' was on the merits; (3) where new law had been made or facts uncovered relating to the constitutional claim since the trial and appeal; and (4) where the trial or appellate court based its rulings on findings of fact made after a hearing that was not full and fair." Kapatos v. United States, 432 F. 2d 110,

113 (2d Cir. 1970), cert. denied, 401 U.S. 909 (1971); Sanders v. United States, 373 U.S. 1 (1963). Keeping these principles in mind, we now turn to petitioner's claims.

IMPERMISSIBLE SUGGESTIVE IDENTIFICATION OF CHARLES HEDGES BY CHARLES BOURBONNAIS

Charles Hedges and Charles Bourbonnais were government witnesses at both the Armone trial and petitioner's trial, and both were involved in the conspiracy of which petitioner was convicted. Petitioner contends that Bourbonnais' in-court identification of a picture of Hedges was tainted by an im-

permissibly suggestive pre-trial identification, in violation of his constitutional rights, as set forth in United States v. Wade, 388 US 218 (1967), Gilbert v. California, 388 US 263 (1967), and Stovall v. Denoo, 388 US 293 (1967)

Specifically, petitioner claims the impermissive suggestion occurred when the prosecution brought Bourbonnais and Hedges together in a face-to-face confrontation prior to trial in the office of Assistant United States Attorney William Tendy. Petitioner further contends that without this "one on one" process of confrontation, Bourbon-

nais would have had no independent source by which to identify Hedges. In support of this contention, petitioner points to Bourbonnais' testimony at the Armone trial regarding the meeting in Mr. Tendy's office:

Bourbonnais "A. I did not recognize Mr. Hedges at that particular time. He himself said hello and recited the incident and the circumstances under which we met previously.

* * *

Mr. Kasanof "Q. It wasn't until Mr. Hedges said something to you that you recognized him?

Bourbonnais "A. I did not recognize him, sir. I recognized the incident of our previous meeting at the time he met me on 55th Street and First Avenue." (Armone Tr. 2438-2439)

No constitutional right of petitioner was violated by the meeting of Bourbonnais and Hedges in Mr. Tendy's office. The Wade, Gilbert and Stovall trilogy are inapplicable. These and other cases upon which petitioner relies deal with pre-trial confrontations of an accused for identification, absent counsel, by a prospective government witness. In those cases, the Court held

that a post-indictment lineup was a critical stage of the prosecution at which a defendant was entitled to the assistance of counsel. United States v. Wade, supra, 388 U.S. at 237.

Here, the pre-trial confrontation was between prospective government witnesses and not, as in the cases cited by petitioner, between an accused and a prospective government witness. Petitioner was not present at the meeting in Mr. Tendy's office, and it would be an absurdity for us to hold that petitioner's right to counsel extends to the government's interviewing of witnesses

in the preparation of its case.

Moreover, the Armone transcript reveals that Bourbonnais was hesitant in identifying Hedges because they had only met twice before and because Bourbonnais was of the opinion that Hedges played a small part in the conspiracy. (Armone Tr. 2433-2434; 2606-2607.)

Accordingly, we conclude that petitioner's claim of denial of a constitutional right because of a tainted in-court identification is without merit.

PROSECUTION'S DELIBERATE SUBORNATION OF PERJURY

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Petitioner's contentions numbered I, II, VI, IX, X and XII all concern his allegation that the prosecution suborned perjury. He alleges in I, II and VI that the prosecution's subornation of perjury improperly and illegally influenced both the grand jury to indict him and the petit jury to convict him. He further alleges in IX and X that false statements by the prosecution denied him a full and fair review of his case both on appeal and on his petition for certiorari. Finally, he contends in XII that the government's grant of immunity from prosecution to

Hedges and Bourbonnais and its promise to reduce their sentences is a process so likely to produce perjury that it violates due process of law.

It would be a gross understatement to say petitioner's application lacks specificity in support of these allegations. Sprinkled here and there throughout his twenty-eight page application are clues to the alleged perjury, although he never identifies one perjurious statement. Petitioner does, however, state that the testimony of both Charles Hedges and Charles Bourbonnais was perjurious.

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Considering Hedges' testimony first, petitioner makes the broad conclusory statement that Hedges' testimony was given to "create as impressive a picture of prosecution potential as he could for the sole purpose of enhancing the possibility of earning his freedom as a reward for the combination of fact and perjurous (sic) fantasy his testimony represented." Nowhere, however, does petitioner cite a single perjurious statement made by Hedges; nor does he even cite any testimony given by Hedges. Such unsupported conclusory allegations and spe-

culation do not raise issues which would require an evidentiary hearing, nor the ultimate relief petitioner seeks. Cf. Burris v. United States, 403 F. 2d 399, 402 (7th Cit. 1970), cert. denied, 401 U.S. 921 (1971).

Turning to Bourbonnais' alleged perjury, petitioner contends that Hedges, at the identification confrontation with Bourbonnais in Mr. Tendy's office, was allowed by the prosecution to recite events to Bourbonnais which never occured and that this recital became Bourbonnais' entire testimony. He further contends that such an identifi-

cation procedure by the government could "accurately (be) categorized as deliberate subornation of perjury." These contentions are patently frivolous.

The vast majority of Bourbonnais' direct testimony described the procedure he followed as a courier in bringing narcotics into the United States and the various contacts he had here and abroad. Approximately seven pages of direct testimony out of a total of seventy-four pages concerned Hedges. The record is perfectly clear that Bourbonnais had only minimal contact with Hedges and that it was necessary for Hedges to re-

fresh Bourbonnais' memory of their previous meetings. This is borne out by the cross and redirect examinations of Bourbonnais at the Armone trial:

Cross

Bourbonnais "A. Mr. Hedges' picture was shown to me on several occasions and I could never identify him for the simple reason that he was just a small part in this transaction, and he had complete --" (Armone Tr. 2433-2434.) (Emphasis added.)

Redirect

Mr. Morvillo "Q. Do you remember on cross-examination Mr. Kasanof asked you about a meeting that took place in Mr.

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Tendy's office with Mr. Hedges?

Bourbonnais "A. Yes, Sir.

Mr. Morvillo "Q. Would you tell the court and jury what happended during that meeting?

Bourbonnais "A. I would be glad to. On this particular meeting I was asked to come down to Mr. Tendy's office to identify a man. In the room at the time I believe Mr. Tendy was present, Mr. Hedges, which I know now is Mr. Hedges, myself and one or two other men. I don't recall.

Mr. Tendy turned to me and asked me if I knew this particular man, referring to Mr. Hedges. I

told him that I did not know him. He asked me to be sure, to take another look. I looked for a few moments and again I assured Mr. Tendy that I did not know him at all.

Finally, Mr. Hedges came up to me and said, 'Charlie don't you remember me'?

I said "No, I do not."

He said 'I am the fellow that came up to your car that day and you gave the two suitcases.' He described how he was dressed and then upon this description of that, I recollected the incident.

Mr. Morvillo "Q. Was that the first time that you remem-

bered Mr. Hedges?

Bourbonnais "A. Yes, that was the first time, although I would never have recognized him at the time but, as I said, when he told me what transpired between he and I, I remembered definitely the meetings that had taken place between he and I. There were only two." (Armone Tr. 2606-2607.)

Petitioner's allegations that Hedges recited Bourbonnais' entire testimony is, therefore, at variance with the record and completely lacking in merit.

Additionally, petitioner's alle-

gation that the testimony of Hedges and Bourbonnais was perjurious because of government promises is without merit, as petitioner has failed to demonstrate any perjurious testimony.

Accordingly, we find petitioner's allegation that the government suborned perjury to be without merit.

DENIAL OF ADEQUATE ASSISTANCE OF TRIAL COUNSEL

Petitioner alleges that he was denied adequate assistance of counsel because his attorney, James M. LaRossa, ineffectively cross-examined Charles Bourbonnais. In support of this con-

tention, petitioner points to the fact that at the Armone trial three defense lawyers cross-examined Bourbonnais for a total of 412 pages of trial transcript, whereas at his trial, Mr. LaRossa's and Mr. Hanrahan's cross-examination of Bourbonnais totalled only 49 pages of trial transcript.

Petitioner also contends that Mr. LaRossa stated on the record that he was unprepared to proceed with the cross-examination of Bourbonnais. This allegation is patently frivolous. Nowhere in the record is there evidence that Mr. LaRossa was unprepared to cross-

examine Bourbonnais and petitioner's assertion that Mr. LaRossa stated so is, therefore, a material misstatement of the record.

Petitioner's bald contention that the mere length of a cross-examination is somehow related to the quality of the cross-examination is sheer nonsense. Verbosity and lengthy cross-examinations are the hallmarks of incompetence, not of effective advocacy. Also, petitioner has failed to specify how the cross-examination was ineffective, except for its alleged brevity. That was obviously a tactical decision

and, in our opinion, wise in the circumstances. Petitioner had the good fortune to be represented by one of the most experienced and competent members of the criminal bar of the City of New York and his performance in petitioner's behalf was in the highest tradition of the bar.

Accordingly, we conclude that petitioner's claim of denial of effective assistance of counsel is totally without merit.

DENIAL OF RIGHT TO CALL WITNESSES IN HIS OWN BEHALF

Petitioner contends that he was

denied his right to call witnesses in his own behalf because the prosecution had him tried jointly with his brother, thereby making it morally impossible for him to testify without prejudicing the cause of his brother.

It is axiomatic that persons jointly charged in a conspiracy should be tried together unless it is shown that a defendant will be substantially prejudiced by a joint trial. Rule 14, Fed.R.Crim.P., United States v. Bentvena, 319 F.2d 916 (2d Cir.), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963); United States v. Burgio, 279 F. Supp. 843 (S.D.N.Y. 1968).

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Petitioner's alleged moral obligation to his brother does not substantially prejudice his case and, therefore, would not be ground for a separate trial.

Accordingly, we conclude that petitioner's alleged denial of his right to call witnesses and to testify in his own behalf is without merit.

PROSECUTION'S DELIBERATE WITHHOLDING OF EXCULPATORY MATERIAL

Petitioner claims that the prosecution suppressed exculpatory evidence which it was obligated to turn over to the defense in accordance with Brady v.

Maryland, 373 U.S. 83 (1963).

In vague terms, petitioner contends that the government failed to turn over contradictory statements of Charles Bourbonnais given under oath, although petitioner does not identify when or where these statements were made. Petitioner does, however, make reference to alleged inconsistent statements of Bourbonnais given at the Armone trial.

The government has no duty under Brady to turn over contradictory statements of a witness made at a prior trial when the records of that trial

are public. Brady deals with the suppression by the prosecution of evidence favorable to the accused, and it is clearly inapplicable here because the prosecution could not and did not suppress the transcript of the Armone trial.

Petitioner further contends that the government also violated Brady in failing to turn over the results of a lie detector test taken by Bourbonnais. This contention is another palpable misstatement of the record, since the government did turn over the results of the lie detector test when it gave defense counsel 3500 material before Bour-

bonnais testified. See Government Exhibit 75 and Trial Transcript, p. 487 ("Tr. ___").

Finally, we find no merit in petitioner's additional claims in his "Amendment to Motion to Vacate Sentence" that the government failed to turn over as 3500 material the grand jury testimony of Hedges and Bourbonnais. The record is clear that Hedges' grand jury testimony (Government Exhibit 31), and Bourbonnais' grand jury testimony (Government Exhibits 82, 83, 84 and 87) were turned over to defense counsel for inspection. (Tr.], 487 and 559.)

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Accordingly, we conclude that petitioner's Brady contention is without merit.

PREJUDICIAL CHARGE TO THE JURY

Petitioner claims that the court's charge was "patently erroneous as a statement of law" because it contained an instruction whereby the jury had to find all defendants guilty or all defendants not guilty. On the contrary the court specifically charged that:

> "The guilt or innocence of each defendant must be determined by you separately. In other words, under our law,

> there is no such thing as guilt by mere association. Each defendant has the right to the same kind of consideration on your part as you would give him if he were being tried alone." (Tr. 1141-42)

This claim, furthermore, was squarely raised, considered and rejected on direct appeal and, therefore, will not be considered here. United States v. Guanti, supra, 421 F.2d at 798; Castellano v. United States, 378 F.2d 231, 233, (2d Cir. 1967).

Moreover, the court's charge is not reviewable by way of collateral attack under 28 U.S.C. § 2255. Banks v. United States, 287 F.2d 374 (7th Cir.),

cert. denied, 366 U.S. 939 (1961).

Thus, this claim is also without merit.

CONSPIRACY PROVISION OF 21 U.S.C. § 174 IS UNCONSTITUTIONAL

Petitioner claims that the conspiracy provision of 21 U.S.C. § 174, under which he was convicted, is unconstitutional.

The short answer to this claim is that federal conspiracy statutes have consistently been held to be constitutional. Clune v. United States, 159 U.S. 590, 595 (1895); Callan v. Wilson, 127 US 540, 555-556 (1888); See

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Dennis v. United States, 341 U.S. 494, 511 (1951); Pinkerton v. United States, 328 U.S. 640, 643 (1946).

Accordingly, this claim is without merit.

Finally, petitioner requests that he be allowed to take a lie detector test. Nothing could be gained by such a test and, therefore, this request is in all respects denied.

MOTION TO DISQUALIFY

The ground urged by petitioner as a basis for disqualification is that the trial judge "has obtained in this

case a bias against myself and my co-defendants, so strong as to affect his objectivity in assessing the claims made in my pending Motion to Vacate Sentence." Though not explicitly stated, this phase of the petition is apparently premised on 28 U.S.C. § 144. That statutue provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state

> the facts and the reasons for the belief that bias or prejudice exists . . . . A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that is is made in good faith."

The moving papers are utterly devoid of any facts showing personal bias or prejudice against petitioner on the part of the trial judge. The statute and the decisions under it make clear that it must appear from the facts presented in the petition that the bias is personal in nature, that is, an attitude of extrajudicial origin as opposed to one acquired during the course

of judicial proceedings. United States v. Grinnell Corp., 384 US 563, 583 (1966); Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794, 797-798 (2d Cir. 1966); Foster v. Medina, 170 F.2d 632 (2d Cir.), cert. denied, 335 US 909 (1949); Ormento v. United States, 328 F. Supp. 246, 260 (S.D.N.Y.), aff'd without opinion, Docket No. 71 Cr. 1628 (2d Cir., Oct. 28, 1971); Mirra v. United States, 379 F. 2d 782, 787-788 (2d Cir.), cert. denied, 389 US 1022 (1967).

This application, therefore, is

insufficient on its face in that, at most, it seizes upon a few isolated instances out of context occurring during the course of a two-week trial, which petitioner interprets as manifestations of the court's bias against him. Most of these consist of nothing more than the court's overruling objections or denying motions by his counsel or other defense attorneys, which petitioner claims were erroneous. Patently, petitioner's bald conclusions of bias are legally insufficient.

For example, petitioner claims that the court erroneously permitted

Hedges, a co-conspirator, to relate statements made by codefendants Pacelli and Ricucci during the course of the conspiracy which tended to inculpate the petitioner. There was no objection to this testimony, quite obviously, because it is hornbook law that statements of co-conspirators, in furtherance of the conspiracy, are admissible against all conspirators.

Again, as further evidence of the trial judge's bias, petitioner points to the judge's refusal to accept requests to charge from his counsel, after all counsel had concluded their summations

and five minutes before the court charged the jury. Surely, our ruling was not only reasonable and justified but fully supported by Rule 30, Fed.R. Crim.P., which requires the submission of requests to charge at the close of the evidence and not after summations by counsel, a few minutes before the charge, as was the case here. Moreover, petitioner's counsel was given, and availed himself of, a full opportunity to take exception to the court's charge.

Petitioner's other allegations of bias are equally frivolous. In short,

he utterly fails to show "a bent of mind (on the part of the trial judge) that might prevent or impede impartiality of judgment" in the present proceedings. Berger v. United States, 255 US 22, 33-34 (1921).

Finally, 28 U.S.C. § 144 requires, among other things, that an affidavit of bias and prejudice "shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Counsel of record for petitioner upon the trial of this case was James M. LaRossa, and upon the appeal David B.

Isbell and James M. LaRossa. Neither has filed a certificate of good faith on behalf of petitioner. Nor, indeed, has petitioner's present counsel, Henry B. Rothblatt, a member of the bar of this court, retained by him to file the amended petition which added the charge of bias on the part of the trial judge.

The requirement of such a certificate is not a mere technicality but one of the essential requirements of the statute. Ormento v. United States, supra, 328 F. Supp. at 260-261. Although this is a significant defect in the instant motion to disqualify,

we do not rely on it in disposing of the motion.

Neither the petition nor amended petition shows any factual basis for the claim of bias and prejudice. We have never held any personal bias or prejudice, nor acted as a result of any bias or prejudice, against this petitioner nor any defendant in this case. Nor have we held any bias or prejudice, nor acted as a result of any bias or prejudice, in favor of the prosecution. Each and every action of the court is a matter of record. All of our rulings were objective, impersonal, based on

the evidence and incidents happening during the trial, and to the best of our ability were made in accordance with the law, regardless of the party or parties affected.

Accordingly, petitioner's motion to vacate the judgment of conviction and sentence heretofore imposed upon him, for a hearing, and to disqualify the trial judge from considering this application for post-conviction relief is in all respects denied.

So ordered.

Dated: New York, N.Y.
January 5, 1972

/s/ Lloyd F. MacMahon
United States District Judge

OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 761 - September Term, 1971

(Argued May 9, 1972. Decided May 30, 1972

Docket No. 72-1107

----*----

DOMINICK ROMANO,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

----*----

Before:

FRIENDLY, Chief Judge,
MOORE and ANDERSON, Circuit Judges.

OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

----*----

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, District Judge, denying without a hearing a motion to vacate a judgment of conviction pursuant to 28 U.S.C. § 2255 and denying a motion that the District Judge disqualify himself pursuant to 28 U.S.C. § 144.

Affirmed.

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OPINION OF THE SECOND CIRCUIT COURT OF APPEALS

Henry B. Rothblatt, New York, N. Y. (Rothblatt, Rothblatt, Seijas & Peskin, New York, N. Y., on the brief), for Appellant.

John C. Sabetta, Assistant United States Attorney, New York, N. Y., (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, N.Y. and Peter F. Rient, Assistant United States Attorney, New York, N.Y., of counsel), for Appellee.

PER CURIAM:

Dominick Romano appeals from an order denying without a hearing his motion to vacate a judgment of conviction

pursuant to 28 U.S.C. § 2255 and denying his motion that the District Judge disqualify himself from determining the motion for post-conviction relief pursuant to 28 U.S.C. § 144. Finding no error, we affirm.

Appellant is presently serving a 20-year sentence which was imposed after he was found guilty of having conspired to violate the Federal Narcotics Laws, 21 U.S.C. § 173, 174. The judgment of conviction was affirmed by this court in United States v. Guanti, 421 F.2d 792 (2d Cir.), cert. denied, 400 U.S. 832 (1970). For a statement

of the facts in this case see the opinion in Guanti, supra.

In the papers submitted in support of his motion to vacate his judgment of conviction, appellant alleges that the prosecution knowingly used perjurious testimony at his trial. This claim is without merit. No evidence of perjury is noted and no false testimony is cited. The fact that a prosecution witness may have a criminal record is not sufficient basis for vacating a judgment of conviction when the witness' criminal record was known at the time of trial. Similarly, the

mere assertion that a witness might have had a motive to lie, when unsupported by any fact, does not entitle a petitioner to a hearing on the alleged use of perjurious testimony.

Also without merit is the claim of prejudice emanating from an allegedly improper in-court photographic identification of one prosecution witness by another. According to the appellant, the in-court identification was tainted by an impermissibly suggestive pre-trial confrontation between the two witnesses. The appellant argues that this confrontation was in violation of his consti-

tutional rights as enumerated in United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967) and Stovall v. Denno, 388 U.S. 293 (1967).

None of appellant's constitutional rights were violated when these two witnesses met at an interview before trial. Appellant's right to counsel does not extend to the government's interviewing of witnesses in preparation of its case when the appellant was not even present at this meeting.

Appellant's third claim, that he was deprived of the effective assis-

tance of counsel was rejected by this court in an earlier appeal. Guanti, supra at 799. As no additional facts are cited in support of the claim, it can be dismissed as being without merit.

The remaining contentions, that the District Judge should have disqualified himself from determining this motion and that appellant's right to testify in his own behalf was frustrated because the trial court denied his motion to sever his trial from that of his brother, are without any merit.

The order of the District Court is therefore affirmed.

DENIAL OF REHEARING BY THE SECOND CIRCUIT COURT OF APPEALS

72-1107

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

Dominick Romano,

Petitioner-Appellant,

v.

United States of America,

Defendant-Appellee.

----------x

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested

DENIAL OF REHEARING BY THE
SECOND CIRCUIT COURT OF APPEALS

that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY,
Chief Judge

July 3, 1972

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

Sixth Amendment of The United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Cousel for his defense.

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

28 U.S.C. 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be

made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a

denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief

on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also

appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

28 U.S.C. 144:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall

proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

DIAGRAM OF THE ALLEGED CONSPIRACY

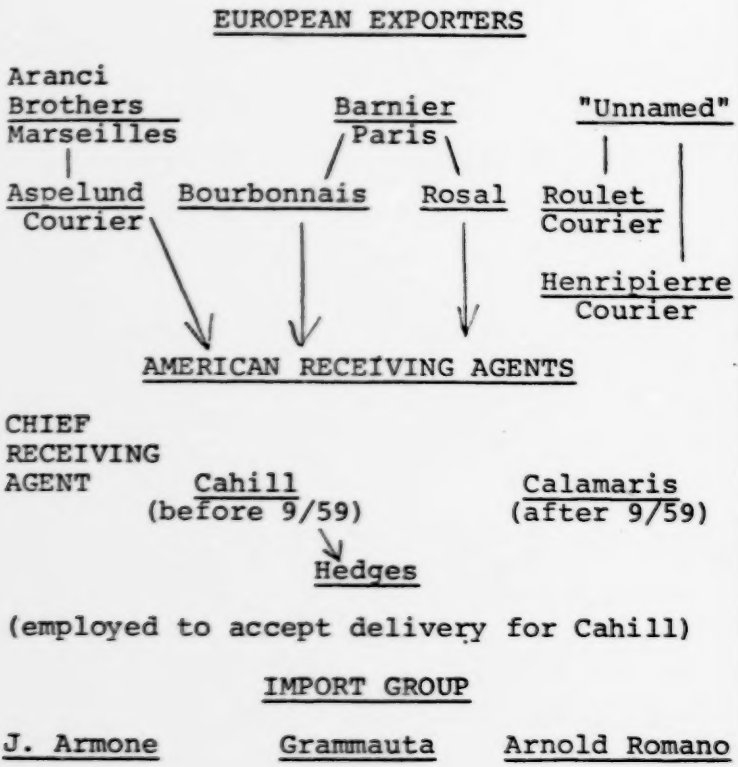


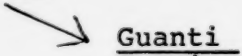
DIAGRAM OF THE ALLEGED CONSPIRACY

ALLEGEDLY "PERFORMED SERVICES"
FOR IMPORT GROUP

Dominick Romano Sherbicki

WHOLESALE DISTRIBUTORS

Pacelli Ricucci



Guanti
Courier

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-199

DOMINICK ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Southern District of New York, petitioner was convicted in 1969 of having conspired to import and distribute large amounts of heroin in violation of 21 U.S.C. (1964 ed.) 174. He was sentenced to twenty years' imprisonment. The conviction was affirmed on appeal sub nom. *United States* v. *Guanti,* 421 F.2d 792 (C.A. 2), and certiorari was denied, 400 U.S. 832. Thereafter petitioner filed the present motion to vacate sentence under 28 U.S.C. 2255, accompanied by a request that the trial judge disqualify himself from determining the motion. The

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trial judge, in an extensive opinion, declined to recuse himself and denied the motion to vacate sentence without a hearing (Pet. App. A 1–44). The court of appeals affirmed *per curiam* (Pet. App. A 47–52).

Petitioner's various contentions are insubstantial and are fully answered in the opinions below, on which we rely.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972